FILE COPY

No. [redacted] 113

FILED

MAY 20 1946

Supreme Court of the United States

(October Term, A. D. 1945)

J. L. Llewellyn,
Petitioner,

versus

Joseph R. Fleming and Aaron Colson, Trustees of the Chicago, Rock Island & Pacific Railway Company, a Corporation; and the Chicago, Rock Island & Pacific Railway Company, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Mark Goode,
American National Bank Building,
Shawnee, Oklahoma.
Counsel for Petitioner.

John L. Goode,
American National Bank Building,
Shawnee, Oklahoma.
Of Counsel.

May, 1946.

Hyperbaric Publishing Co., 10 S. Wallen, Oklahoma City, 4, Okla.

INDEX

PAGE

Petition for Writ of Certiorari 1

Opinions in the Courts Below 2

Summary Statement of the Matter Involved 3

Jurisdiction of This Court 5

Questions Presented 6

Reasons Relied on for the Allowance of the Writ .. 7

Specifications of Errors 8

Prayer 9

Brief in Support of Petition for Writ of Certiorari ... 10

Opinion of the Court Below 10

Statement of the Case 10

Specifications of Errors to be Urged 10

Summary of the Argument 11

Argument 12

CASES CITED:

Brand v. Penn. Railway Company, 22 Fed. Supp. 569 8

Elgin Joliet & Eastern Rwy. Co. v. Burley, et al., 325 U. S. 711, 89 L. Ed. 1886 .....6, 7, 11, 13

Grand International Brotherhood v. Mills, 31 Pac. (2d) 973, Ariz. 1934 8

Nord, et al. v. Griffin (C. C. A. 7), 86 Fed. (2d) 481 .....11, 14

INDEX CONTINUED

PAGE

Order of R. R. Telegraphers v. Railway Express Agency, 321 U. S. 342, 88 L. Ed. 788 ..... 6, 7

Steele v. L. & N. R. R. Co., 323 U. S. 208, 89 L. Ed. 186 ..... 11, 14

Switchmen's Union of N. A. v. National Mediation Board, 320 U. S. 277, 88 L. Ed. 61 6

Teague v. Brotherhood of L. Firemen, etc. (C. C. A. 6), 127 Fed. (2d) 53 ..... 5, 11, 14

Williams v. Jacksonville Terminal Co., 315 U. S. 386, 86 L. Ed. 914 ..... 13, 14

STATUTES CITED:

Judicial Code, Sec. 240, as amended by Act of Feb. 13, 1925 5

Railway Labor Act, Title 45, Sec. 151-164 USCA, 45 Stat. 1185, c 691 ..... 7, 12

No. .....

Supreme Court of the United States

(OCTOBER TERM, A. D. 1945)

J. L. LEWELLYN,
Petitioner,

VERSUS

JOSEPH B. FLEMING and AARON COLNON, TRUSTEES of the CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation; and the CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Justices of the Supreme Court of the United States:

Comes now J. L. Lewellyn, and respectfully petitions this Honorable Court to grant a writ of *certiorari* to review the opinion and decree of the United States Circuit Court of Appeals for the Tenth Circuit, rendered and entered on the 14th day of March, 1946, in the case lately pending in said United States Circuit Court of Appeals for the Tenth

Circuit, styled J. L. Lewellyn, Appellant v. Joseph B. Fleming and Aaron Colnon, Trustees of the Chicago, Rock Island & Pacific Railway Company, a corporation; and the Chicago, Rock Island & Pacific Railway Company, a corporation, Appellees, being No. 3229 of causes on the docket of said United States Circuit Court of Appeals for the Tenth Circuit, affirming the decree of the United States District Court for the Western District of Oklahoma in said cause against the petitioner and in favor of respondent herein; which said decree of the United States Circuit Court of Appeals for the Tenth Circuit became final on April 10, 1946, by the denying by that Court of petitioner's petition for a rehearing.

OPINIONS IN THE COURTS BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit in said cause of J. L. Lewellyn (plaintiff-appellant) and Joseph B. Fleming and Aaron Colnon, Trustees of the Chicago, Rock Island & Pacific Railway Company, a corporation; and the Chicago, Rock Island & Pacific Railway Company, a corporation (defendants-appellees) which petitioner here seeks to have reviewed, is not yet officially reported, but appears on pages 24 to 28 of the transcript of the printed record filed herewith.

No opinion was rendered by the District Court.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The material controlling facts are:

In 1917 petitioner, J. L. Lewellyn, hereinafter referred to as "Lewellyn" was employed by the Chicago, Rock Island & Pacific Railway Company, hereinafter referred to as the "Railroad," to work in the Pool Freight Service in the Shawnee-El Reno district of Oklahoma (R. 11-12, 15).

At the time Lewellyn and the Railroad entered into the contract of employment in 1917 it was the then custom and understanding acted on by all parties that each employee in the Pool Freight Service in the Shawnee-El Reno district would and did acquire seniority rights superior to the seniority rights of employees serving on other districts or subdivisions of the Railroad (R. 12, 15).

Lewellyn has remained ever since said time in the employ of the Railroad and has not been subject to dismissal or discharge at will but only for good causes such as insubordination and drunkenness (R. 2-25).

The Railroad Company recognized and observed the seniority rights of Lewellyn continuously until about January 1, 1942, when it adopted a new practice known as "Airplane" seniority and proceeded to post a new seniority roster and placed the names of forty-one men thereon ahead of plaintiff, all of said men being men from other districts who had never acquired any seniority rights in the Shawnee-El Reno district. Lewellyn never consented to or acquiesced in the attempt to change seniority rights (R. 12, 17).

The change made in the seniority rights on the Shawnee-El Reno district by the Railroad in 1942 was the result of a contract entered into between the Railroad and the Order of Railway Conductors, the bargaining agent of the craft of Railway Conductors under the Railway Labor Act, and appears in the record at pages 5-7, inclusive.

Beginning in 1942, the Railroad refused to recognize the seniority right of Lewellyn and this suit was brought. The value of the seniority right was alleged to be in excess of $8,000.00, and it was admitted that the amount in controversy exceeds $3,000.00, and that the requisite diversity of citizenship exists (R. 2, 25).

The District Court rendered judgment against Lewellyn and in favor of the Railroad, upon the pleadings and admissions of the parties as to the facts (R. 14-18).

On appeal the Circuit Court of Appeals affirmed, holding that the individual seniority right of Lewellyn was destroyed by the collective bargaining agreement of 1938, negotiated by the Railroad and the Order of Railway Conductors, the bargaining agent of the craft.

The decision of the United States Circuit Court of Appeals for the Tenth Circuit was rendered on March 14, 1946, and within the time required under the rules of said court, petitioner filed petition for rehearing, urging that the court had erroneously construed the meaning of the Railway Labor Act and that its decision was in conflict with the decision of the Sixth Circuit Court of Appeals in the

case of *Teague* v. *Brotherhood of Locomotive Firemen*, 127 Fed. (2d) 53 (R. 29, 33).

On April 10, 1946, petition for rehearing was denied (R. 34).

The duly certified record, including all the proceedings in said cause in said United States District Court for the Western District of Oklahoma and the United States Circuit Court of Appeals for the Tenth Circuit is filed herewith under separate cover.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by Act of February 13, 1925, and that portion of Subsection (b) of Paragraph five (5) of Rule Thirty-eight (38) of Revised Rules of the Supreme Court of the United States, made in pursuance thereof, viz:

> "Where a Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this court,".

And also that portion of Subsection (b) of Paragraph five (5) reading:

> "Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter."

This case originated in the United States District Court for the Western District of Oklahoma.

The amount involved exceeds $3,000.00 and the requisite diversity of citizenship exists (R. 11).

The opinion of the Circuit Court of Appeals was filed March 14, 1946. Petition for rehearing was filed in the time allowed, under the rules of said Court and denied and final decree was entered on April 10, 1946 (R. 34).

Cases thought to sustain the jurisdiction are:

—*Elgin Joliet & Eastern Railway Co.* v. *Burly, et al.*, 325 U. S. 711, 89 L. Ed. 1886;

Switchmen's Union of N. A. v. *National Mediation Board*, 320 U. S. 277, 88 L. Ed. 61;

Williams v. *Jacksonville Terminal Co.*, 315 U. S. 386, 86 L. Ed. 914;

Order of R. R. Telegraphers v. *Railway Express Agency*, 321 U. S. 342, 88 L. Ed. 788.

QUESTIONS PRESENTED

The questions presented by petitioner's petition herein for a writ of *certiorari* are:

(1) Did the Circuit Court of Appeals err in holding that a seniority right acquired by a railroad employee under an individual contract of employment entered into prior to the passage of the Railway Labor Act may be abrogated by a subsequent agreement between the Railroad and the collective bargaining agent of a craft of railroad employees under the Railway Labor Act?

(2) Is the holding of the Circuit Court of Appeals in this case to the effect that a bargaining agent selected

under the Railway Labor Act has authority to do away with the seniority right acquired under individual contract prior to the passage of the Railway Labor Act in conflict with the decision of the Sixth Circuit Court of Appeals in the case of *Teague* v. *Brotherhood of Locomotive Firemen*, 127 Fed. (2d) 53?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

This case presents important questions never before decided by this Court concerning the authority of a collective bargaining agent under the Railway Labor Act. 48 Stat. 1185 c 691, 45 USCA Sec. 151 ff.

The questions are:

(1) Is the seniority right of a railway employee acquired under individual employment contract prior to the passage of the Railway Labor Act within the proper scope or field of collective bargaining under the Railway Labor Act? 48 Stat. 1185, c 691, 45 USCA, Sec. 151 ff.

(2) Is such a seniority right a vested property right within the meaning protection of the Fifth Amendment to the Constitution of the United States?

These questions are unsettled in so far as this Court is concerned and are important to the administration of the Railway Labor Act.

Such questions have been regarded as of sufficient importance to justify the granting of *certiorari*. See *Order of R. R. Telegraphers* v. *Railway Express Agency*, 321 U. S.

342, 88 L. Ed. 788; *Elgin Joliet & Eastern Railway Co.* v. *Burley, et al.*, 325 U. S. 711, 89 L. Ed. 1886.

Seniority rights are of vital importance to those who work for wages. *Grand International Brotherhood* v. *Mills*, 31 Pac. (2d) 973, (Ariz. 1934); *Brand* v. *Penn. Railway Company*, 22 Fed. Supp. 569.

If the decision of the Circuit Court of Appeals in this case stands, individual seniority rights of numerous railway employees built up as the result of many years of service and acquired prior to the passage of the Railway Labor Act under individual contracts will be adversely affected.

SPECIFICATIONS OF ERRORS

Petitioner says that the United States Circuit Court of Appeals for the Tenth Circuit has erred:

(1) In holding that the Railway Labor Act authorized the bargaining agent designated thereunder to abrogate the seniority right of petitioner acquired under individual employment contract prior to passage of the act.

(2) In not holding that the seniority right of petitioner was a vested right within the meaning and protection of the Fifth Amendment to the Constitution of the United States.

PRAYER

WHEREFORE, petitioner prays that a writ of *certiorari* be issued by this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit to the end that the said opinion and decree of said United States Circuit Court of Appeals for the Tenth Circuit in said cause of J. L. Lewellyn, Appellant, v. Joseph B. Fleming and Aaron Colnon, Trustees of the Chicago, Rock Island & Pacific Railway Company, a corporation, and the Chicago, Rock Island & Pacific Railway Company, a corporation, Appellees, No. 3229, be reviewed by this Court as provided by law, and that upon such review said decree be reversed, and that petitioner have such other relief as to this Court may seem appropriate.

MARK GOODE,
Counsel for Petitioner.

JOHN L. GOODE,
Of *Counsel.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit in said cause of J. L. Lewellyn, (plaintiff-appellant) v. Joseph B. Fleming and Aaron Colnon, Trustees of the Chicago, Rock Island & Pacific Railway Company, a corporation; and the Chicago, Rock Island & Pacific Railway Company, a corporation, (defendant-appellee) which petitioner here seeks to have reviewed, is not yet officially reported but appears on pages 24 to 28 of the transcript of the printed record filed herewith.

STATEMENT OF THE CASE

The essential facts of the case are fully stated in petitioner's petition for a writ of *certiorari*, and in the interest of brevity are not repeated here. Reference will be made to such facts, on points involved, in the course of the argument which follows:

SPECIFICATIONS OF ERRORS TO BE URGED

Petitioner says that the United States Circuit Court of Appeals for the Tenth Circuit has erred:

(1) In holding that the Railway Labor Act authorized the bargaining agent designated thereunder to abrogate the seniority right of petitioner acquired under individual employment contract prior to passage of the act.

(2) In not holding that the seniority right of petitioner was a vested right within the meaning and protection of the Fifth Amendment to the Constitution of the United States.

SUMMARY OF THE ARGUMENT

I.

While this Court has not fully defined the field and scope of collective bargaining under the Railway Labor Act, the individual seniority right of petitioner was clearly not within such field and the decision of the Circuit Court of Appeals holding that the Order of Railway Conductors, the bargaining agent, had authority to abrogate the individual seniority right of Lewellyn, the petitioner, acquired prior to the passage of the act, is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Teague* v. *Brotherhood of Locomotive Firemen and Enginemen*, 122 Fed. (2d) 53.

An individual employee's rights cannot be nullified merely by agreement between the carrier and the Union, *Elgin Joliet & Eastern Railway Co.* v. *Burley, et al.*, 325 U. S. 711; 89 L. Ed. 1886.

II.

The seniority right of petitioner was a vested property right within the meaning and protection of the Fifth Amendment to the Constitution, *Nord et al.* v. *Griffin* (C. C. A. 7), 86 Fed. (2d) 481; *Teague* v. *Brotherhood of Locomotive Firemen and Enginemen*, 122 Fed. (2d) 53; and

opinion of Mr. Justice Murphy, *Steele* v. *L. & N. Railway Co.*, 323 U. S. 208, 89 L. Ed. 186.

ARGUMENT

I.

The Circuit Court of Appeals should have held that petitioner's seniority right was not affected by the colletive bargaining agreement entered into by the Order of Railway Conductors and the Railroad, establishing airplane seniority over the Shawnee-El Reno District. Petitioner was not a member of the O. R. C. and had not delegated any authority to it to act for him, and did not ratify or confirm the collective bargaining agreement. The binding force of the collective agreement rests upon the meaning of the Railway Labor Act alone. The provisions of that Act, Title 45, Secs. 151-164 USCA, relating to collective bargaining and the authority of the bargaining agent, read:

> "First: It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the applications of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof. Second: All disputes between a carrier or carriers and its or their employees shall be considered, and if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof inter-

> ested in the dispute. Third: Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other. Fourth: Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter * * * That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization * * *."

While collective bargaining is not defined by the Railway Labor Act (*Order of R. R. Telegraphers* v. *Railway Exp. Agency*, 321 U. S. 342, 88 L. Ed. 788), yet collective bargaining is to settle for the future alone without reference to or effect upon the past. *Elgin, Joliet & Eastern Railway Co.* v. *Burley, et al.*, 89 L. Ed. 1886, 325 U. S. 711. Collective agreements under the act cannot annul or deprive employees of their individual rights. *Elgin, Joliet & Eastern Railway Co. supra.*

The bargaining provisions of the Railway Labor Act are squarely limited to collective action. The Act deals with collective bargaining agreements only and not with the employment of individuals. *Williams* v. *Jacksonville Terminal Co.*, 315 U. S. 386, 86 L. Ed. 914. Consequently the O. R. C. had no authority to enter into any collective

bargaining agreement which had the effect of destroying the individual seniority right of petitioner acquired prior to the passage of the Act under an individual employment contract with the Railroad Company. Furthermore the decision in the case at bar is in conflict with the decision of *Teague* v. *Brotherhood of L. Firemen, etc.,* (C. C. A. 6), 127 Fed. (2d) 53, wherein the Court in speaking of the effect of the Railway Labor Act upon the seniority right of a fireman acquired by virtue of an individual employment contract, said:

> "While the employees are guaranteed the right to select a common bargaining representative, there is nothing in the Act which authorizes their representative to impair the personal or property rights of the employees for whom the bargaining agency acts."

II.

The Railway Labor Act could not affect the seniority right of petitioner, because such right was a vested right at the time of the passage of the Act within the meaning and protection of the Fifth Amendment to the Constitution of the United States. In *Nord* v. *Griffin* (C. C. A. 7), 86 Fed. (2d) 481, in speaking of individual seniority rights the Court said:

> "Obviously the District Court was correct in concluding that the award deprived Appellee of his property rights * * * The rights of plaintiff are protected by the Fifth Amendment."

In a special concurring opinion in *Steele* v. *L. & N. R. R. Co.*, 323 U. S. 208, 89 L. Ed. 186, Mr. Justice Murphy said concerning the Railway Labor Act:

> "The Act contains no language which directs the manner in which the bargaining representative shall perform its duties. But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect. For that reason I am willing to read the statute as not permitting or allowing any action by the bargaining representative in the exercise of its delegated powers which would in effect violate the constitutional rights of individuals."

In *Teague* v. *Brotherhood of L. Firemen, etc., supra,* it was also held that seniority rights acquired through individual contracts of employment are within the protection of the Fifth Amendment to the Constitution of the United States.

It is respectfully submitted that this Honorable Court should grant *certiorari* herein, and upon a hearing of this cause reverse the judgments of both the Circuit Court of Appeals for the Tenth Circuit, and the United States District Court for the Western District of Oklahoma.

Respectfully submitted,

MARK GOODE,
American National Bank Building,
Shawnee, Oklahoma.

Counsel for Petitioner.

JOHN L. GOODE,
American National Bank Building,
Shawnee, Oklahoma.
Of Counsel.

May 14, 1946.